TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STA

OCTOBER TERM, 1888.

No. 1102.

THE UNITED STATES, APPELLANT,

vs.

HENRY TAUBENHEIMER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED [illegible]
DISTRICT OF OREGON.

FILED SEPTEMBER 15, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1102.

THE UNITED STATES, APPELLANT,

vs.

HENRY TAUBENHEIMER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

INDEX.

	Original.	Print.
Proof of service of citation	1	1
Citation	2	1
Caption	3	1
Petition in equity	4	1
Proof of service of petition	8	4
Demurrer to petition	10	4
Final decree	13	5
Clerk's certificate	14	6

7450

1 DISTRICT OF OREGON, *ss:*

I certify that on the 30th day of August, 1888, at Portland, Oregon, Multnomah County, in said district, I duly served the within citation on appeal upon the therein named Henry Taubenheimer *to*, and by delivering to him personally a true copy of said citation on appeal, duly certified to by me as U. S. marshal.

JOHN MYERS,
United States Marshal,
By W. W. ROBERTS,
Deputy.

2 UNITED STATES OF AMERICA,
District of Oregon, ss:

To Henry Taubenheimer, plaintiff in the case of Henry Taubenheimer, v. The United States, defendant, greeting:

Whereas The United States, defendant above named, has lately appealed to the Supreme Court of the United States from a decree rendered in the circuit court of the United States for the district of Oregon, in your favor, and has given the security required by law; you are, therefore, hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. eighteen hundred and eighty-eight, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this August 30th, 1888.

MATTHEW P. DEADY,
U. S. District Judge.

(Indorsed:) No. 1482. U. S. circuit court, district of Oregon. Henry Taubenheimer vs. The United States. Citation on appeal. Filed Aug. 30, 1888. R. H. Lamson, clerk, by R. B. Lamson, deputy clerk,

3 In the circuit court of the United States for the district of Oregon, April term, 1888.

Be it remembered that on the 20th day of August, 1888, there was duly filed in the circuit court of the United States for the district of Oregon a petition in equity, in words and figures as follows, to wit:

4 In the circuit court of the United States for the district of Oregon.

HENRY TAUBENHEIMER, PETITIONER AND complainant,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT. } Petition in equity.

To the judges of the circuit court of the United States for the district of Oregon:

Your petitioner, Henry Taubenheimer, a citizen and resident of the

State of Oregon, brings this, his petition against the United States, and shows:

I.

That your petitioner's full name is Henry Taubenheimer, and that he resides in Multnomah County, State of Oregon, and within the district of Oregon.

II.

That on and prior to August 16th, 1883, the SE. quarter of section 28, in township No. 6 N., of range No. 3 west, of the Willamette meridian, in Columbia County, Oregon, was surveyed public land of the United States, and subject to entry and purchase under and by virtue of the act of Congress of June 3d, 1878, and was unfit for cultivation, but was chiefly valuable for the timber thereon.

III.

That on 16 day of Aug., 1883, your petitioner having therefore complied in every respect with all the requirements of said act, and of all the regulations relating to the acquisition of land under said act, so as to entitle him to purchase and pay for the same, and claim and receive a patent from the United States therefor, did, on Aug. 16, 1883, at the United States land office in Oregon City, Oregon, purchase said land from the United States, and did then and there pay to the receiver of said land office all the fees required therefor, and the sum of $400, that being the purchase price of said land, at the price of $2.50 per acre, and the price for which the United States agreed to and did sell said land to your petitioner.

IV.

That at the time of said purchase and the payment of said sum to said receiver, he, the said receiver, made, executed, and delivered to your petitioner a certificate and receipt therefor.

V.

That said property exceeds in value the sum of $5,000, and does not exceed in value the sum of $10,000.

VI.

That six years have not elapsed since said purchase of said land from the United States, and since the right to a patent for said land accrued.

VII.

That ever since the payment of said money for said land and the purchase thereof, the United States has retained and still retains the same.

VIII.

That the claim for a patent for said land has never heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same.

IX.

That no patent was ever issued for said land granting or conveying the same from the United States. And this defendant and its servants, whose duty it is to execute said patent, although often requested so to do, neglect and refuse to do so.

6

X.

Your petitioner, therefore, to the end that the full and perfect legal title to said land may be vested in your petitioner, prays of this honorable court:

1st. A decree of this court that your petitioner is the owner of said land by virtue of said purchase from defendant.

2d. That the United States issue and deliver or cause to be issued and delivered, in accordance with law, a patent granting and conveying said described property to your petitioner.

May it please your honors to grant unto your petitioner the necessary writ, obligation, or requirement, issuing out of and under the seal of this honorable court, to be directed to the defendant, the United States of America, and served upon the Attorney-General of the United States and to the United States district attorney for the district of Oregon, commanding them and each of them, on a certain day, and under a certain penalty, that the said United States do appear and answer to the premises, and stand to and abide by, and perform such order and decree therein, as to the court shall seem proper, and as shall be agreeable to equity and good conscience. And your petitioner will ever pray.

W. SCOTT BEEBE,
JAMES K. KELLY,
Attorneys and Solicitors for Petitioners.

STATE OF OREGON,
County of Multnomah, ss:

I, Henry Taubenheimer, being first duly sworn on my oath, say that I am the petitioner above named, and that I have read the foregoing petition by me subscribed, and that the same and the matters therein stated are true.

H. TEUBENHEIMER.

Subscribed and sworn to before me this 17 day of Aug., 1888.

[SEAL.] W. SCOTT BEEBE.
Notary Public for Oregon.

(Endorsed:) Filed Aug. 20, 1888. R. H. Lamson, clerk.

State of Oregon, brings this, his petition against the United States, and shows:

I.

That your petitioner's full name is Henry Taubenheimer, and that he resides in Multnomah County, State of Oregon, and within the district of Oregon.

II.

That on and prior to August 16th, 1883, the SE. quarter of section 28, in township No. 6 N., of range No. 3 west, of the Willamette meridian, in Columbia County, Oregon, was surveyed public land of the United States, and subject to entry and purchase under and by virtue of the act of Congress of June 3d, 1878, and was unfit for cultivation, but was chiefly valuable for the timber thereon.

III.

That on 16 day of Aug., 1883, your petitioner having therefore complied in every respect with all the requirements of said act, and of all the regulations relating to the acquisition of land under said act, so as to entitle him to purchase and pay for the same, and claim and receive a patent from the United States therefor, did, on Aug. 16, 1883, at the United States land office in Oregon City, Oregon, purchase said land from the United States, and did then and there pay to the receiver of said land office all the fees required therefor, and the sum of $400, that being the purchase price of said land, at the price of $2.50 per acre, and the price for which the United States agreed to and did sell said land to your petitioner.

IV.

That at the time of said purchase and the payment of said sum to said receiver, he, the said receiver, made, executed, and delivered to your petitioner a certificate and receipt therefor.

V.

That said property exceeds in value the sum of $5,000, and does not exceed in value the sum of $10,000.

VI.

That six years have not elapsed since said purchase of said land from the United States, and since the right to a patent for said land accrued.

VII.

That ever since the payment of said money for said land and the purchase thereof, the United States has retained and still retains the same.

VIII.

That the claim for a patent for said land has never heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same.

IX.

That no patent was ever issued for said land granting or conveying the same from the United States. And this defendant and its servants, whose duty it is to execute said patent, although often requested so to do, neglect and refuse to do so.

6

X.

Your petitioner, therefore, to the end that the full and perfect legal title to said land may be vested in your petitioner, prays of this honorable court:

1st. A decree of this court that your petitioner is the owner of said land by virtue of said purchase from defendant.

2d. That the United States issue and deliver or cause to be issued and delivered, in accordance with law, a patent granting and conveying said described property to your petitioner.

May it please your honors to grant unto your petitioner the necessary writ, obligation, or requirement, issuing out of and under the seal of this honorable court, to be directed to the defendant, the United States of America, and served upon the Attorney-General of the United States and to the United States district attorney for the district of Oregon, commanding them and each of them, on a certain day, and under a certain penalty, that the said United States do appear and answer to the premises, and stand to and abide by, and perform such order and decree therein, as to the court shall seem proper, and as shall be agreeable to equity and good conscience. And your petitioner will ever pray.

W. SCOTT BEEBE,
JAMES K. KELLY,
Attorneys and Solicitors for Petitioners.

STATE OF OREGON,
County of Multnomah, ss:

I, Henry Taubenheimer, being first duly sworn on my oath, say that I am the petitioner above named, and that I have read the foregoing petition by me subscribed, and that the same and the matters therein stated are true.

H. TEUBENHEIMER.

Subscribed and sworn to before me this 17 day of Aug., 1888.

[SEAL.] W. SCOTT BEEBE.
Notary Public for Oregon.

(Endorsed:) Filed Aug. 20, 1888. R. H. Lamson, clerk.

7 And afterwards, to wit, on the 20th day of August, 1888, there was duly filed in said court a proof of service, in words and figures as follows, to wit:

8 In the circuit court of the United States for the district of Oregon.

HENRY TAUBENHEIMER
vs.
THE UNITED STATES OF AMERICA.

STATE OF OREGON,
Multnomah County, ss:

I, W. Scott Beebe, being first duly sworn, say that on the 20th day of August, 1888, I served the petition in the above-entitled cause on L. L. McArthur, United States district attorney for the district of Oregon, by delivering to him a true copy thereof in Multnomah County, Oregon. And that on said day I deposited with the registry clerk in the post-office at Portland, Oregon, a true copy of said petition duly endorsed in an sealed envelope and directed to "Hon. A. H. Garland, Attorney-General of the United States, Washington, D. C.," and that I caused said letter and sealed envelope to be registered at said post-office, and that I duly stamped said envelope and paid the fees for registering the same.

W. SCOTT BEEBE.

Subscribed and sworn to before me Aug. 20, 1888.

R. H. LAMSON, *Clerk*,
By R. B. LAMSON, *Deputy*.

(Endorsed:) Filed Aug. 20, 1888. R. H. Lamson, clerk, by R. B. Lamson, deputy.

9 And afterwards, to-wit, on the 24th day of August, 1888, there was duly filed in said court a demurrer to petition in words and figures as follows, to-wit:

10 In the circuit court of the United States for the district of Oregon.

HENRY TAUBENHEIMER
vs.
THE UNITED STATES.

Demurrer of the United States, defendant, to the petition of Henry Taubenheimer, the above named petitioner.

This defendant by protestation, not confessing all or any of the matters and things in petitioner's petition contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said petition, and for cause of demurrer doth show:

That said petition doth now show any facts which entitle the petitioner to maintain said petition or have *and* same considered by the court:

That the matters and things in the said petition set forth do not show that the plaintiff has any claim in law, equity, or admiralty against the defendant.

That the petition doth now show that this court hath jurisdiction of the matters and things therein set forth.

Wherefore and for divers other good causes of demurrer appearing in said petition the defendant doth demur thereto and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to said petition, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

LEWIS L. MCARTHUR,
U. S. Attorney.

DISTRICT OF OREGON, *ss*:

I, Lewis L. McArthur, U. S. attorney, do hereby certify that in
11 my judgment the foregoing demurrer is well grounded in law.

LEWIS L. MCARTHUR.

Due service of the within demurrer is hereby admitted at Portland, Or., Aug. 24, 1888.

W. SCOTT BEEBE,
Of Att'ys for Petitioner.

(Endorsed:) Filed Aug. 24, 1888. R. H. Lamson, clerk, by R. B. Lamson, deputy.

12 And afterwards, to wit, on Wednesday, the 29th day of August, 1888, the same being the 72d judicial day of the regular April term of said court; present, the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said case, to wit:

13 In the circuit court of the United States for the district of Oregon.

HENRY TAUBENHEIMER
vs.
THE UNITED STATES. } No. 1482.

AUGUST 29, 1888.

Now at this day this cause is submitted to the court upon the demurrer to the petition, the plaintiff appearing by Mr. W. Scott Beebe, of counsel, and the defendant by Mr. Lewis L. McArthur, United States attorney; on consideration whereof, it is ordered that said demurrer be, and the same is hereby, overruled. Whereupon said plaintiff moves the court for a decree herein upon the pleadings, and said defendant declining to further plead, but electing to stand upon its demurrer to said petition; it is therefore adjudged and decreed that the plaintiff is the lawful purchaser of the lands described in said petition as the southeast quarter of section twenty-eight, in township six north, of range three west, of the Willamet meridian, in Columbia County, Oregon, by virtue of purchase from the defendant; and it is further adjudged and decreed that said defendant, The United States, do issue and deliver or cause to be issued or delivered, in accordance with law, a patent granting and conveying said described lands to the said plaintiff; and it is further adjudged and decreed that the plaint-

iff do have and recover off and from the defendant his costs and disbursements taxed herein at dollars.

(Signed) DEADY, *J.*

(Endorsed:) Filed Aug. 29, 1888. R. H. Lamson, clerk, by R. B. Lamson, deputy.

14 In the circuit court of the United States for the district of Oregon.

UNITED STATES OF AMERICA,
District of Oregon, ss:

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Henry Taubenheimer is the plaintiff and The United States is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, Oregon, this 3d day of September, A. D. 1888.

[SEAL.] R. H. LAMSON, *Clerk,*
By R. B. LAMSON, *Deputy.*

(Indorsement on cover:) No. 1102. The United States appellant, vs. Henry Taubenheimer. Oregon C. C. U. S. Filed September 15, 1888.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1482.

THE UNITED STATES, APPELLANT,

vs.

JAMES B. MONTGOMERY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED JANUARY 9, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1482.

THE UNITED STATES, APPELLANT,

vs.

JAMES B. MONTGOMERY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

INDEX.

	Original.	Print.
Proof of service of citation	1	1
Citation	2	1
Petition	4	1
Affidavit of service of petition	10	3
Demurrer to petition	12	4
Order overruling demurrer	15	5
Opinion	17	5
Decree	19	8
Clerk's certificate	20	8

1 *Proof of service of citation.*

DISTRICT OF OREGON, *ss:*

I certify that on the 25 day of September, 1888, at Portland, Multnomah County, in said district, I duly served the within citation upon the therein named James B. Montgomery, by delivering to him personally a true copy of said citation, duly certified to by me as U. S. marshal.

JOHN MYERS,
United States Marshal,
By H. C. MYERS,
Deputy.

2 *Citation.*

UNITED STATES OF AMERICA,
District of Oregon, ss:

To James B. Montgomery, plaintiff in the case of James B. Montgomery v. The United States, greeting:

Whereas The United States, the defendant above named, has lately appealed to the Supreme Court of the United States from a decree rendered in the circuit court of the United States for the district of Oregon, in your favor, and has given the security required by law, you are therefore hereby cited and admonished to be and appear at Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. eighteen hundred and eighty-eight, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, in said district, this 25th September, 1888.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

(Indorsed:) No. 1483. U. S. circuit court, district of Oregon. James B. Montgomery vs. The United States. Citation on appeal. Filed September 26, 1888. R. H. Lamson, clerk. By D. W. Stevens, deputy clerk.

3 In the circuit court of the United States for the district of Oregon, April term, 1888.

Be it remembered, that on the 25th day of August, 188 , there was duly filed in the circuit court of the United States for the district of Oregon a petition against the United States, in the words and figures as follows, to wit:

4 In the circuit court of the United States for the district of Oregon.

JAMES B. MONTGOMERY, PLAINTIFF,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT.

To the honorable the judges of the circuit court of the United States for the district of Oregon.

The petition of James B. Montgomery, by this his petition, respectfully shows that he resides in Portland, Multnomah County, State of Oregon, and within the judicial district of this court.

That prior to October 28th, 1882, the southwest quarter of section No. ten, in township No. nine north, of range No. one west, of the Willamette meridian, was surveyed public land of the United States and subject to entry and purchase under the act of Congress of the United States, entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory," approved June 3rd,
5 1878, and was valuable chiefly for timber, but unfit for cultivation.

That on said 28th day of October, 1882, your petitioner, being at that time a citizen of the United States, and having theretofore complied with all the requirements of said act, and of the regulations governing the manner of acquiring land under said act, so as to enable him to pay for the same and claim a patent from the United States therefor, did on said day, at the United States land office at Vancouver, Washington Territory, purchase said land from the United States of America, and did then and there pay to the receiver of said land office the sum of four hundred dollars, that sum being the purchase price for said above-described land, at the price of $2.50 per acre.

That said receiver, on payment of said sum as aforesaid, then and there made, executed, and delivered to your petitioner a certificate or receipt therefor, of which the following is a copy, viz:

6 "[Duplicate No. 2024.]

"RECEIVER'S OFFICE AT VANCOUVER,
"*Wash. Ter., October 28th*, 1882.

"Received from James B. Montgomery, of Multnomah County, Oregon, the sum of four hundred dollars and — cents; being in full for the southwest quarter of section No. ten, in township No. nine north, of range No. one west, Will. mer., containing one hundred and sixty acres and — hundredths, at $2.50 per acre.

"S. W. BROWN,
"*Receiver.*

"Fees for examining testimony, $3.15; fees for allowing entry, $10; paid, $400.00."

Your petitioner further shows that said land is of the value of five thousand five hundred dollars, and does not exceed in value ten thousand dollars.

That ever since the payment of said sum of four hundred dollars to said receiver, as aforesaid, he and the defendant have kept and retained the same and now retain and are in possession of said money.

That no patent has ever issued pursuant to said sale to your
7 petitioner, granting or conveying said property from the United States, and your petitioner avers that the defendant and its servants, whose duty it is to execute and issue said patent, although often requested so to do, neglect and refuse to do so, and deny the right of your petitioner to have said patent executed, and deny that he has any interest in said property.

Your petitioner therefore, to the end that his rights as a purchaser of said property may be protected, and that he may be possessed of the full title thereto, prays this honorable court for a decree.

I. That the defendant execute, issue, and deliver, or cause to be executed, issued, and delivered, in accordance with law, a patent, granting and conveying said above described land to your petitioner, and that he be decreed to be the owner of the same, pursuant to said sale to him.

II. That your petitioner recover his costs and disbursements herein expended and to be expended.

JAMES B. MONTGOMERY,
Petitioner.

8 JAMES K. KELLY,
H. T. BINGHAM,
Attorneys for Petitioner.

STATE OF OREGON.

STATE OF OREGON,
Multnomah County, ss:

I, James B. Montgomery, do solemnly swear that I am the petitioner above named; that I have read the foregoing petition and know the contents thereof, and that the same is true, as I verily believe.

JAMES B. MONTGOMERY.

Subscribed and sworn to before me this 24th day of July, 1888.
[SEAL.] H. T. BINGHAM,
Notary Public for the State of Oregon.

(Indorsed:) Filed August 25, 1888. R. H. Lamson, clerk. By Ward S. Stevens, deputy.

9 And afterwards, to wit, on the 25th day of August, 1888, there was duly filed in said court an affidavit of service, in words and figures as follows, to wit:

10 In the circuit court of the United States for the district of Oregon.

JAMES B. MONTGOMERY, PLAINTIFF,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT.

STATE OF OREGON,
County of Multnomah, ss:

I, James K. Kelly, being duly sworn, say that I am one of the attorneys of the plaintiff in the above-entitled suit; that on the 25th day of August, 1888, I served a copy of the plaintiff's petition in this suit upon A. H. Garland, Attorney-General of the United States, by depositing a copy of said petition in the post-office of, at the city of Portland, Oregon,

in a sealed envelope, and paid the postage upon the same as a registered letter, addressed as follows:

"Hon. A. H. GARLAND,
"*Attorney-General of the U. S., Washington, D. C.:*"

And I further say that the said petition was placed in a registered letter and deposited in said post-office.

(Signed) JAMES K. KELLY.

Subscribed and sworn to before me this August 25th, 1888.

(Signed) R. H. LAMSON,
Clerk.
By R. B. LAMSON,
Deputy.

(Endorsed:) Filed August 25, 1888. R. H. Lamson, clerk.

11 And afterwards, to wit, on the 29th day of August, 1888, there was duly filed in said court demurrer to petition, in words and figures as follows, to wit:

12 In the circuit court of the United States for the district of Oregon.

JAMES B. MONTGOMERY
vs.
THE UNITED STATES. } Demurrer to petition.

Demurrer of the United States, defendant, to the petition of James B. Montgomery, the above-named petitioner.

This defendant by protestation, not confessing all or any of the matters and things in the peti'oner's petition contained to be true, in such manner and form as the same is therein set forth and alleged, doth demur to said petition, and for cause of demurrer doth show:

That said petition doth not show any facts which entitle the petitioner to maintain said petition or have the same considered by the court;

That the matters and things in the petition set forth do not show that the plaintiff has any claim in law, equity, or admiralty against the defendant;

That the petition doth not show that this court hath jurisdiction of the matters and things therein set forth;

That the land described in the petition appears upon the face thereof to be situate without the jurisdiction of this court:

Wherefore, and for divers other good causes of demurrer appearing in said petition, the defendant doth demurr thereto and humbly demands the judgment of this court whether it shall be compelled to make
13 any further or other answer to said petition, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

(Signed) LEWIS L. MCARTHUR,
U. S. Attorney.

DISTRICT OF OREGON, *ss:*

I, Lewis L. McArhtur, U. S. attorney, do certify that in my judgment the foregoing demurrer is well grounded in law.

LEWIS L. MCARTHUR.

I hereby accept service of the demurrer this 29th Aug., 1888, at Portland, Oregon.

JAMES K. KELLY,
Attorney for Petitioner.

(Endorsed:) Filed Aug. 29th, 1888. R. H. Lamson, clerk. By R. B. Lamson, deputy.

14 And afterwards, to wit, on Monday, the 3rd day of September, 1888, the same being the 74th judicial day of the regular April term of said court; present, the honorable Matthew P. Deady, United States distric judge, presiding, the following proceedings were had in said case, to wit:

15 In the circuit court of the United States for the district of Oregon.

JAMES B. MONTGOMERY
vs.
THE UNITED STATES. } No. 1483.

SEPTEMBER 3, 1888.

This cause was heared upon the demurrer to the petituon, and was argued by Mr. James K. Kelly and Mr. W. Scott Beebe, of counsel for the plaintiff, and by Mr. Lewis L. McArthur, United States attorney; on consideration whereof it is ordered and adjudged that said demurrer be, and the same is hereby, overruled.

(Signed) DEADY, *J.*

(Endorsed:) Filed Sept. 3, 1888. R. H. Lamson, clerk. By R. B. Lamson, deputy.

16 And afterwards, to wit, on the 3rd day of September, 1888, there was duly filed in said court an opinion in words and figures as follows, to wit:

17 United States circuit court, district of Oregon, Monday, September 3, 1888.

JAMES B. MONTGOMERY
vs.
THE UNITED STATES. } No. 1483. Suit to compel the issue of a patent.

(1) CLAIM TO A PATENT FOR LAND. The word "claim," as used in the act of 1887 (24 Stat., 505), giving this court jurisdiction to hear and determine certain claims against the United States, includes a "claim" by a purchaser of timber land under the act of 1878 (20 Stat., 1889) to have a patent issue for the same. The ruling in Jones v. U. S. affirmed.

(2) SALE OF TIMBER LAND UNDER ACT OF 1878. A sale of timber land under the act of 1878, by the register and receiver of the local land office, is completed on the payment of the purchase price and the delivery of the certificate or receipt therefor, and it is not necessary that the same should be ratified or confirmed by the Commissioner of the General Land Office; but it is the duty of such commissioner on receiving "the papers and testimony in the case" from the local land office, if it appears prima facie therefrom that the law has been complied with, to cause a patent to issue thereon to the purchaser.

(3) JURISDICTION OF EQUITY IN PERSONAM AND UNDER THE ACT OF 1887. A court of equity has jurisdiction of suit to compel the specific performance of a contract to convey land without reference to the locality of the same, and this court has jurisdiction under the act of 1887 of a suit against the United States to compel the issue of a patent to a purchaser of timber land under the act of 1878, although the same is situate in Washington Territory.

DEADY, *J.*:

This suit is brought under the act of March 3, 1887 (24 Stat., 505), entitled "An act to provide for the bringing of suits against the Government of the United States," to compel the issue of a patent to the petitioner to the southwest quarter of section 10, in township 9 north, of range 1 west, of the Wallamet meridian.

It is alleged in the petition that the petitioner resides in Multnomah County, Oregon, and it appears therefrom that the land in question in situated in Cowlitz County, Washington Territory, and is of the value of $5,000 and not more than $10,000; that on October 28, 1882, said land was surveyed public land of the United States, and subject to entry and purchase under the act of June 3, 1878 (20 Stat., 89), for the sale of timber lands in the Pacific States, including Washington Territory, "and was valuable chiefly for timber, but unfit for cultivation;" that on said October 28 the petitioner was a citizen of the United States, and having complied with the requirements of said act and the regulations governing the acquisition of lands thereunder, so as to enable him to pay for the same and claim a patent therefor from the United States, did on said day, at the United States land office at Vancouver, Washington Territory, purchase said land from the defendant, and did then and there pay to the receiver of said land office the purchase price therefor, to wit, the sum of $400, or $2.50 an acre, and that said receiver gave the petitioner "a certificate or receipt" for said money, as "being in full" for said land.

That the defendant keeps and retains said money, and its servants, whose duty it is to execute and deliver to the petitioner a patent for said land, although often requested, refused to do so, and deny the right of the petitioner to have the same or to any interest therein.

The prayer of the petition is that the court will decree that the defendant issue to the petitioner a patent for said land.

Due service was made of the petition, as provided in § 6 of the act of 1887, and the district attorney appears for the defendant and demurs to the petition.

The causes of demurrer are the same as those that were argued and determined in Jones v. The United States, decided in this court on July 16, 1888, in which it was held that an applicant for land under the timber act of 1878 "becomes the purchaser thereof when he makes the prescribed proof to the *satisfaction* of the register and pays the prescribed price therefor," and "when the certificate of purchase is issued to the applicant the land described therein becomes his property. The bare legal title is all that remains in the vendor in trust for the vendee, and if it was a case of a private person a court of equity would compel him to perform his part of the contract by executing and delivering to the vendee the proper conveyance thereof;" and (2) that "the claim" against the United States for a patent arising on this contract of sale with the petitioner is in its nature "enforceable by a suit in equity in this court for a specific performance of the same, and this brings the petitioner within the act of 1887, which gives

her the right to sue the United States on any claim arising on contract by a suit in equity, as if the United States were suable, which must mean as if the United States was a private person;" and also (1), that the land in question is without the territorial jurisdiction of the court, and (2) that this sale under the act of 1878 is not binding on the Government until is ratified or confirmed by the Commissioner of the General Land Office.

As to the second point, it is sufficient to say that the statute provides that on payment of the purchase money "the applicant may be permitted to enter the same * * * and on the transmission to the General Land Office of the papers and the testimony in the case a patent shall issue thereon."

It may be admitted that, notwithstanding the peremptory language of the statute, "the papers and testimony in the case" must show a prima facie compliance with the law before the purchaser is entitled to the patent. And if there was any fraud in the proceeding before the local land office, sufficient to vitiate the purchase and overcome the prima facie case, the Government can set it up as a defense to the suit for specific performance, where the rights of the parties may be examined and passed on judicially, as they ought to be.

As to the first point, the objection is founded on a misconception of the nature of the suit. This is not a local action to recover the possession of the land, but a transitory one to enforce the specific performance of a contract concerning the same. In such a proceeding a court of equity operates by its decree in personam on the defendants, and not in rem on the subject-matter, and therefore it matters not whether the land which is the subject of the contract is within the territorial jurisdiction of the court or not. If the court gets jurisdiction of the parties, it has jurisdiction to determine what, if any, contract exists between them and enforce it against the party in default, and may compel obedience to its decree by proceedings in the nature of punishment for contempt. (3 Pom. Eq., § 1317; 2 Story's Eq., § 743.)

But, assuming as I do, that "the claim" of the plaintiff is within the purview of the act of 1887, this court has jurisdiction in this case without reference to the locality of the land, simply because Congress, by that act, has conferred it. The petitioner is required to bring his suit, not in the district where the land is situated, but in that in which he resides. The United States is potentially existent or resident throughout the States and Territories, and agrees by the terms of the act to submit to the jurisdiction of the court in which the suit is brought on due notice thereof being given to its attorney and representative. And thus the court gets jurisdiction of the parties and the cause, and it is immaterial, either under the statute or the general principles of equity jurisdiction, where the land for which the patent is sought may lie.

The demurrer is overruled.

Mr. W. Scott Beebe and Mr. James K. Kelly for the plaintiff.

Mr. Lewis L. McArthur for the defendant.

(Signed) MATTHEW P. DEADY,
U. S. District Judge.

(Endorsed): Filed Sept. 3, 1888. R. H. Lamson, clerk, By R. B. Lamson, deputy.